



SURFACE TRANSPORTATION BOARD

[Docket No. FD 36500]

Canadian Pacific Railway Limited; Canadian Pacific Railway Company; Soo Line Railroad Company; Central Maine & Quebec Railway US Inc.; Dakota, Minnesota & Eastern Railroad Corporation; and Delaware & Hudson Railway Company, Inc.

—Control—Kansas City Southern; The Kansas City Southern Railway Company; Gateway Eastern Railway Company; and The Texas Mexican Railway Company

AGENCY: Surface Transportation Board.

ACTION: Decision No. 11 in Docket No. FD 36500; Notice of Acceptance of Application; Issuance of Procedural Schedule.

SUMMARY: The Surface Transportation Board (Board) is accepting for consideration the application filed on October 29, 2021 (Application), by Canadian Pacific Railway Limited (Canadian Pacific), Canadian Pacific Railway Company (CPRC), and their U.S. rail carrier subsidiaries, Soo Line Railroad Company (Soo Line), Central Maine & Quebec Railway US Inc., Dakota, Minnesota & Eastern Railroad Corporation, and Delaware & Hudson Railway Company, Inc. (collectively, CP) and Kansas City Southern and its U.S. rail carrier subsidiaries, The Kansas City Southern Railway Company (KCSR), Gateway Eastern Railway Company, and The Texas Mexican Railway Company (Tex Mex) (collectively, KCS) (CP and KCS collectively, Applicants). The Application seeks Board approval for the acquisition of control by Canadian Pacific, through its indirect, wholly owned subsidiary Cygnus Merger Sub 2 Corporation (Cygnus Merger Sub 2 Corp.), of Kansas City Southern, and through it, of KCSR and its railroad affiliates, and for the resulting common control by Canadian Pacific of its U.S. railroad subsidiaries, and KCSR and its railroad affiliates. This proposal is referred to as the Transaction.

The Board finds that the Application is complete as it contains all information required by the Board's regulations. Accordingly, the Application is accepted. The Board adopts a procedural schedule for consideration of the Application.

DATES: The effective date of this decision is November 26, 2021. Any person who wishes to participate in this proceeding as a Party of Record must file, no later than December 13, 2021, a notice of intent to participate if they have not already done so.

Applicants shall file a proposed Safety Integration Plan (SIP) with the Board's Office of Environmental Analysis (OEA) and the Federal Railroad Administration (FRA) by December 28, 2021. Descriptions of anticipated responsive applications, including inconsistent applications, are due by January 12, 2022. Petitions for waiver or clarification with respect to such applications are also due by January 12, 2022.

Responsive environmental information and environmental verified statements for responsive, including inconsistent, applicants are due by February 22, 2022. Comments, protests, requests for conditions, and any other evidence and argument in opposition to the Application are due by February 28, 2022. This includes any comments from the U.S. Department of Justice (DOJ) and U.S. Department of Transportation (USDOT). All responsive applications, including inconsistent applications, are also due by February 28, 2022. Responses to comments, protests, requests for conditions, and other opposition—including responses to DOJ and USDOT filings—are due by April 22, 2022. Rebuttal in support of the Application is also due by April 22, 2022. Responses to responsive applications, including inconsistent applications, are also due by April 22, 2022.

Rebuttals in support of responsive applications, requests for conditions, and other opposition must be filed by May 23, 2022. Final briefs will be due by July 1, 2022. If a public hearing or oral argument is held, it will be held after the filing of final briefs on a date to be determined by the Board.

For further information regarding dates, see the Appendix to this decision.

ADDRESSES: Any filing submitted in this proceeding should be filed with the Board via e-filing on the Board's website. In addition, one copy of each filing must be sent (and may be sent by e-mail only if service by e-mail is acceptable to the recipient) to each of the following: (1) Secretary of Transportation, 1200 New Jersey Avenue, S.E., Washington, DC 20590; (2) Attorney General of the United States, c/o Assistant Attorney General, Antitrust Division, Room 3109, Department of Justice, Washington, DC 20530; (3) CP's representative, David L. Meyer, Law Office of David L. Meyer, 1105 S Street, N.W., Washington, DC 20009; (4) KCS's representative, William A. Mullins, Baker & Miller PLLC, Suite 300, 2401 Pennsylvania Avenue, N.W., Washington, DC 20037; (5) any other person designated as a Party of Record on the service list; and (6) the administrative law judge assigned in this proceeding, the Hon. Thomas McCarthy, 1331 Pennsylvania Avenue, N.W., Washington, DC 20004-1710, and at ctolbert@fmshrc.gov and zbyers@fmshrc.gov.

FOR FURTHER INFORMATION CONTACT: Valerie Quinn at (202) 245-0283. Assistance for the hearing impaired is available through the Federal Relay Service at (800) 877-8339.

SUPPLEMENTARY INFORMATION: Applicants are seeking approval under 49 U.S.C. 11321-26 for a proposed transaction that involves the acquisition of control by Canadian Pacific, through its indirect, wholly owned subsidiary Cygnus Merger Sub 2 Corp., of Kansas City Southern, and through it, of KCSR and its railroad affiliates, and for the resulting common control by Canadian Pacific of its U.S. railroad subsidiaries, and KCSR and its railroad affiliates.

By decision served April 21, 2021, the Board found the Transaction to be a "major" transaction under 49 CFR 1180.2(a), as it is a control transaction involving two or more Class I railroads. Canadian Pacific presently controls Soo Line, a Class I railroad, and proposes to acquire common control of KCSR, also a Class I railroad. See

Canadian Pac. Ry.—Control—Kan. City S. (Decision No. 3), FD 36500, slip op. at 3 (STB served Apr. 21, 2021). By decision served April 23, 2021, following a public comment period, the Board found the proposed transaction to be subject to the regulations set forth at 49 C.F.R. part 1180, subpart A, in effect before July 11, 2001, pursuant to the waiver for a merger transaction involving KCS and another Class I railroad under 49 CFR 1180.0(b). See Canadian Pac. Ry.—Control—Kan. City S. (Decision No. 4), FD 36500, slip op. at 2-3 (STB served Apr. 23, 2021) (with Vice Chairman Primus dissenting).

The Transaction. As described in the Application, the Transaction involves all of the U.S. mainline and branch line mileage of the CP and KCS rail systems.¹ (App.1-31.)² The CP rail network spans Canada from the Pacific Ocean at Vancouver to the Atlantic Ocean at Saint John, N.B. In the United States, CP owns rail property in Michigan, Illinois, Minnesota, North Dakota, South Dakota, Wisconsin, Maine, Vermont, Iowa, Missouri, and New York, reaching into the U.S. industrial centers of Chicago, Ill., Detroit, Mich., Buffalo, N.Y., Albany, N.Y., Kansas City, Mo., and Minneapolis, Minn. (Id. at 1-20; id., Ex. 13, Operating Plan 8.) CP’s principal routes serving the United States extend from six Canada/United States border crossings: North Portal, Sask./Portal, N.D.; Emerson, Man./Noyes, Minn.; Windsor, Ont./Detroit; Buffalo; Rouses Point, N.Y.; and a point near Jackman, Me., on the Quebec/Maine border. CP also operates a short stretch of branch line trackage between Abercorn, Que., and Richford, Vt. (Id. at 1-22 to 1-23.)

¹ A full description of CP’s and KCS’s principal routes, as well as maps of CP’s and KCS’s respective systems, is provided in the Application. (See Appl., 1-22 to 1-26; id., Ex. 13, Operating Plan 8-23; id., Ex. 1, Maps.)

² Citations to the Application refer to the internal page numbers of the referenced document, which appear on the bottom left-hand corner of each page. For example, “Appl. 1-31” refers to Application, Volume 1, page 31.

The KCS rail network extends in a north-south corridor from Kansas City, south to the Pacific Ocean at the Port of Lazaro Cardenas, Mexico. (Id. at 1-24.) In the United States, KCS owns rail property in Alabama, Arkansas, Illinois, Kansas, Louisiana, Mississippi, Missouri, Oklahoma, Tennessee, and Texas. (Id. at 1-20.) KCSR's network is centered on Shreveport, La., with lines radiating in five directions. (Id. at 1-24.) KCSR's north-south corridor extends from the Mexican border at Laredo, Tex., to Kansas City. (Id.) The "Meridian Speedway" line runs east-west through Shreveport, between the Dallas, Tex. area and a connection with Norfolk Southern Railway Company (NSR) at Meridian, Miss.³ (Id. at 1-25.) KCSR operates a secondary line that extends southeast from Shreveport to New Orleans, La. (Id.) KCSR also operates the former "Gateway Western" lines extending east from Kansas City to Springfield, Ill., and East St. Louis, Ill., where it connects with the Terminal Railroad Association of St. Louis and other Class I railroads. (Id.) KCSR also operates several former "MidSouth" branch lines in Mississippi and Tennessee. (Id.)

As set forth in the September 15 Merger Agreement, Canadian Pacific, through its indirect, wholly owned subsidiary Cygnus Merger Sub 2 Corp., would acquire KCS. (Id. at 1-2.) Upon receipt of approval by the shareholders of Canadian Pacific and KCS and the satisfaction of other customary closing conditions, Cygnus Merger Sub 2 Corp. would merge with and into KCS (the Merger), with KCS surviving the Merger. (Id.) Upon completion of the Merger, holders of KCS's common stock would become entitled to receive a combination of Canadian Pacific common shares and cash in exchange for their common stock, and holders of KCS's preferred stock would become entitled to receive cash in exchange for their preferred shares. (Id.) Immediately following completion of the

³ Applicants state that the portion of line between Shreveport and Meridian is owned by KCS's affiliate Meridian Speedway, LLC, in which NSR has a 30 percent ownership interest, and is operated by KCSR. (Appl. 1-25.)

Merger, Canadian Pacific would conduct a series of internal transactions that would result in its voting interest in the successor to KCS being placed into a voting trust,⁴ pending review and approval of the control Transaction by the Board.⁵ (Id.) As a result of the internal transactions, KCS would legally be merged with and into Cygnus Merger Sub 1 Corporation, a wholly owned subsidiary of CP, with Cygnus Merger Sub 1 Corporation surviving. (Id.) However, the successor holding company of KCS would continue to own KCS's railroad and other affiliates, and would maintain the same name, governance structure, and other corporate-level attributes of KCS. (Id.)

Applicants state that, if and when the Board grants the Application, CP accepts any conditions imposed by the Board, and the Board's approval becomes administratively final, then the voting trust would be terminated and Canadian Pacific would assume control of KCS. (Id. at 1-3.)

By decision served May 6, 2021, the Board found that, subject to certain required modifications described in that decision, Applicants' proposed placement of KCS into a

⁴ Applicants state that the internal transactions involve a series of steps designed to address matters relating to tax and corporate law, and all of those steps, including the placement of Canadian Pacific's interest in KCS into a voting trust, would be completed within moments of the completion of the Merger and for practical purposes contemporaneously. Specifically, (a) KCS would merge with and into Cygnus Merger Sub 1 Corporation (Cygnus Merger Sub 1 Corp.), a direct, wholly owned subsidiary of Canadian Pacific, with Cygnus Merger Sub 1 Corp. surviving; (b) Canadian Pacific would contribute its shares in Cygnus Merger Sub 1 Corp. to CPRC, a direct, wholly owned subsidiary of Canadian Pacific; (c) CPRC would contribute its shares in Cygnus Merger Sub 1 Corp. to Cygnus Holding Corp., an indirect, wholly owned subsidiary of Canadian Pacific; (d) CPRC would transfer its shares in Cygnus Holding Corp. to Canadian Holdco, an indirect, wholly owned subsidiary of Canadian Pacific; and (e) Canadian Pacific would cause Cygnus Holding Corp. to contribute its entire interest in Cygnus Merger Sub 1 Corp., and thus in KCSR and its railroad affiliates, to the voting trust. (Appl. 1-3.)

⁵ Applicants state that CP's acquisition of KCS's shares (and placement of those shares into a voting trust) is contingent on the approval of the Transaction by the shareholders of both CP and KCS—which is expected by the end of 2021—and the approval of Comisión Federal de Competencia Económica (the Mexican competition authority) and Instituto Federal de Telecomunicaciones (the Mexican communications regulatory authority), which is expected by the end of 2021 or at the latest during the first quarter of 2022. (Appl. 1-5.)

voting trust during the pendency of the control proceeding would comply with the guidelines at 49 C.F.R. part 1013, comport with past agency policy and practice, and sufficiently ensure that the day-to-day management and operation of KCS would not be controlled by Canadian Pacific or anyone affiliated with Canadian Pacific while KCS remains in trust. See Canadian Pac. Ry.—Control—Kan. City S. (Decision No. 5), FD 36500, slip op. at 6 (STB served May 6, 2021); see also Canadian Pac. Ry.—Control—Kan. City S. (Decision No. 8), FD 36500, slip op. at 3-5 (STB served Sept. 30, 2021) (with Vice Chairman Primus dissenting) (finding that the approval granted in Decision No. 5 for Applicants to use a voting trust applied to the voting trust described in Applicants’ amended prefilng notification filed on September 15, 2021).

Financial Arrangements. According to Applicants, CP would acquire all of the voting securities of KCS in a stock and cash transaction, as detailed in their September 15 Merger Agreement. (Appl. 1-8.) Applicants state that Canadian Pacific would fund the stock portion of the consideration through the issuance of up to 264,723,997 Canadian Pacific common shares, which would represent approximately 28 percent of the issued and outstanding shares of the combined entity. (Id.) Applicants state that the cash portion of the consideration, together with all related fees and expenses, is expected to total \$8.5 billion, which Canadian Pacific would fund through a combination of cash on hand and new debt. (Id.) Applicants explain that the new debt would be raised by CPKC issuing senior unsecured notes on substantially similar terms to its outstanding unsecured notes, and that, in the event the entire amount of debt has not been raised before the acquisition of KCS shares, CP has obtained commitments to borrow up to \$8.5 billion via a senior unsecured 364-day bridge loan from Bank of Montreal and Goldman Sachs Lending Partners LLC, among other financial institutions. (Id. at 1-8 to 1-9.)

Passenger Service Impacts. Applicants assert that the Transaction would “not result in any detrimental impact” on the operations of the National Railroad Passenger

Corporation (Amtrak) or on commuter operations; rather, the Transaction “should foster expansion in passenger operations” on the combined CP-KCS system. (*Id.*, Ex. 13, Operating Plan 61.)

Amtrak Operations. Currently, as detailed in the Application, CP hosts Amtrak’s daily Empire Builder long-distance train between Chicago and St. Paul, Minn., as well as seven pairs of Amtrak Hiawatha Service trains between Chicago and Milwaukee, Wis. (six pairs on weekends). (*Id.*, V.S. Creel 17-18.) In Upstate New York, CP hosts two daily pairs of Amtrak trains: the Adirondack (which operates between New York City and Montreal) between Schenectady, N.Y., and the U.S. border at Rouses Point, and the Ethan Allen Express (which operates between New York City and Rutland, Vt.) between Schenectady and Whitehall, N.Y. (*Id.*, V.S. Creel 18.) Applicants note that, “[w]hile the segments on which Amtrak operates will see increases in freight train volumes, CP’s infrastructure capacity over these routes[,] together with its scheduling of freight trains to avoid conflicts with passenger train schedules[,] will support the increased traffic without negatively affecting Amtrak service.” (*Id.*, Ex. 13, Operating Plan 62.) Applicants further state that a combined CP-KCS system would “facilitate Amtrak’s planned expansion of its passenger rail network” by enabling CP to offer Amtrak the opportunity to increase train frequencies on its Hiawatha Service and of its Empire Builder train, as some of the freight traffic CP would otherwise interchange in Chicago with Union Pacific Railroad Company (UP), BNSF Railway Company (BNSF), and Canadian National Railway Company (CN) would bypass Chicago entirely. (*Id.*, V.S. Creel 19.)

Applicants state that, while KCS does not host Amtrak in the United States, Amtrak operates over KCS-owned trackage to which other Amtrak host railroads have access under joint facility and/or trackage rights agreements, and that Amtrak also operates over trackage of other carriers to which KCS has access. (*Id.*, Ex. 13, Operating

Plan 63-64.) For example, Amtrak's Sunset Limited operates between Beaumont, Tex., and Rosenberg, Tex., over UP trackage that KCS currently uses pursuant to trackage rights. (*Id.*, Ex. 13, Operating Plan 64.) At Beaumont, UP has operating rights across the KCS-owned Neches River bridge, and Amtrak operates using those rights. (*Id.*) While the Transaction is projected to increase KCS's train volumes between Beaumont and Rosenberg by 8.3 trains per day, Applicants state that they would schedule to avoid the time slot during which the Sunset Limited is scheduled to operate and anticipate that UP dispatchers would continue to afford Amtrak trains appropriate priority over freight operations. (*Id.*) Further, Applicants state that they would prioritize Amtrak over the Neches River bridge in coordination with UP to minimize any adverse impact on Amtrak's operations. (*Id.*) Moreover, Applicants note that CP has committed to working with Amtrak to facilitate establishing Amtrak passenger service on KCS's line between Baton Rouge, La., and New Orleans once CP acquires control of KCS. (*Id.*, V.S. Creel 20.)

Commuter Rail Operations. Applicants state that the operation of commuter trains on CP-owned lines and CP freight trains on commuter-owned lines—specifically, lines owned by the Northeast Illinois Regional Commuter Railroad Corporation (Metra), the Chicago-area commuter rail agency—are governed by joint facility agreements that restrict the times of day during which passenger and freight trains may operate. (*Id.*, Ex. 13, Operating Plan 65.) Currently, Metra's Milwaukee District North line provides commuter service between Chicago and Fox Lake, Ill., a route that includes 17 miles of CP-owned track between Rondout, Ill., and Fox Lake. (*Id.*, Ex. 13, Operating Plan 65-66.) CP's Elgin Subdivision includes 34.3 miles of trackage rights over Metra's Milwaukee District West Line, between Tower A5 in Chicago (also known as Pacific Junction) and Almora, Ill. (near Elgin, Ill.). (*Id.*, Ex. 13, Operating Plan 66.) Applicants assert that a combined CP-KCS system would avoid adverse impacts on commuter

service by scheduling additional freight traffic outside of the time slots reserved for commuter operations and that ample capacity on the Elgin Subdivision would accommodate the projected increase in freight traffic so as not to adversely impact commuter operations.⁶ (Id., Ex. 13, Operating Plan 65-66.)

Discontinuances/Abandonments. Applicants state that no lines would be abandoned and that no facilities would be rationalized because of the Transaction. (Appl. 1-7.)

Public Interest Considerations. According to Applicants, the Transaction would improve the quality and availability of rail transportation services to the public, as a combined CP-KCS network would offer more efficient and reliable single-line rail transportation between points throughout CP's service territory in Canada and the Upper Midwest and points throughout KCS's service territory in the South Central United States and Mexico. (Appl. 1-14 to 1-15.) Applicants contend that avoiding an interchange at Kansas City, which is the only point where the CP and KCS networks connect, would reduce cost, improve transit times, boost reliability and predictability, and facilitate more aggressive competition against other Class I railroads. (Id. at 1-15 to 1-16.)

According to Applicants, the Transaction would allow for new and improved train services, including new intermodal services connecting Dallas with Chicago and points beyond, as well as single-line intermodal routes connecting Mexico with the Upper Midwest and Canada. (Id. at 1-15.) Applicants contend that the combined CP-KCS network would strengthen competition among rail carriers and would be more efficient and a more capable competitor with long-haul trucks, as Applicants' new intermodal rail

⁶ Applicants note that, while KCS does not currently host commuter trains on its network in the United States, Dallas Area Rapid Transit (DART) is constructing a new commuter line that would overlap with 15 miles of KCS trackage rights over DART-owned trackage west of Wylie, Tex., to Renner, Tex. (Appl., Ex. 13, Operating Plan 66.) Applicants assert that there would be no impact on DART's proposed operations, as KCS operations west of Wylie are not expected to see any increase in train activity. (Id.)

services would annually divert more than 60,000 long-haul truck shipments to rail. (Id. at 1-11, 1-28; id., V.S. Mutén 17-22.)

Applicants assert that the Transaction would also enable more efficient blocking patterns for manifest traffic moving between the KCS and CP systems. (Appl. 1-16.) According to Applicants, an integrated system would improve equipment utilization and allow for more efficient rail transportation with the same number of locomotives and railcars, which would improve cycle times for shippers who provide their own railcars and benefit all customers with the greater availability of railcars. (Id.) Applicants state that new rail traffic on the integrated system would support investment in additional capacity, service quality, and safety on a CP-KCS north-south rail artery, transforming a relatively underutilized route into a more efficient, higher capacity, and safer artery of north-south trade in North America capable of supporting improved service levels. (Id. at 1-17.) According to Applicants, the innovations and improvements enabled by CP's operating model, including improved asset utilization, reduction of costs, and improved on-time performance and service reliability, serve as "the catalyst for enabling CP/KCS to serve customers better." (Id., V.S. Brooks 11.)

Applicants assert that the Transaction would "generate competitive benefits and cause no competitive harm." (Appl. 1-11.) Applicants contend that, because the CP and KCS networks do not overlap, connecting only at Kansas City, no shippers, stations, or corridors would "suffer any diminished competition," and also assert that there would be no reduction in geographic or product competition. (Id.) Applicants further assert that shippers would not face any reduction in routing options or confront any new "bottlenecks," as a combined CP-KCS system would have strong incentives to maintain all of the efficient interline routes in which they participate today. (Id.) Applicants state that, while they would compete against KCS's existing interline routes where new single-line routes offer advantages for customers, they would continue to support, both

operationally and commercially, these existing interline routes, committing to keep all existing gateways open on commercially reasonable terms, including the Laredo Gateway.⁷ (Id. at 1-7; id., V.S. Ottensmeyer 6; id., V.S. Brooks 18-22.) Applicants further commit to not creating any new regulatory “bottlenecks,” by waiving the right to refuse to quote a separately challengeable short-haul tariff rate to an existing interchange with another carrier, in light of their new ability to handle traffic in single-line service. (Appl. 1-7; id., V.S. Brooks 23.)

Schedule for Consummation. Applicants state that CP would acquire the shares of KCS from the voting trust and thereby exercise control over KCS upon the effectiveness of a Board decision approving the Transaction. Applicants further note that integration of the two systems would begin as soon as possible and expect full integration to be completed within three years of the Board’s decision approving the Transaction. (Appl. 1-5 to 1-6.)

Environmental Impacts. Applicants acknowledge that environmental review under the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321-4370m-12, is necessary in this case. As discussed below, the increased traffic that would result from this transaction would exceed the Board’s thresholds for environmental review. Due to the potentially significant impact that the Transaction may have on the environment and communities in the affected area, the Board will prepare a full Environmental Impact Statement (EIS). Applicants also have agreed to prepare a Safety Integration Plan (SIP), pursuant to the Board’s regulations at 49 CFR 1106 and the

⁷ Applicants state that KCS is now, and the combined entity would continue to be, subject to the conditions related to traffic moving via Laredo previously imposed by the Board in Kansas City Southern—Control—The Kansas City Southern Railway, 7 S.T.B. 933 (2004), as well as terms related to the Laredo Gateway contained in the evergreen agreement that KCS entered into with the National Industrial Transportation League in conjunction with that transaction. (Appl., V.S. Ottensmeyer 6, 21; id., V.S. Brooks 21.)

FRA's regulations at 49 C.F.R. part 244, which will be addressed in the EIS. In the SIP, Applicants will specify how they would ensure safe operations during the merger and implementation process.

Historic Impacts. As part of the approval process, the Board must evaluate the potential impacts of the Transaction on historic properties, in accordance with section 106 of the National Historic Preservation Act (NHPA), 54 U.S.C. 306108; the section 106 implementing regulations, 36 C.F.R. part 800; and the Board's environmental regulations, 49 C.F.R. part 1105. Applicants do not propose to construct any new rail lines subject to Board licensing or to abandon any rail lines as part of the Transaction. However, Applicants propose to make certain capital improvements within the existing rail right-of-way, including adding approximately four miles of double track on the KCS Pittsburg Subdivision, adding approximately five miles of facility working track adjacent to the International Freight Gateway intermodal terminal near Kansas City, and adding or extending 24 passing sidings along the combined network.

Labor Impacts. Applicants state that, given the projected traffic growth resulting from the Transaction, they anticipate that over 1,000 operating positions would be created across CP-KCS's North American network, with more than 800 of those positions in the United States, and with most of the anticipated job growth in union-represented positions. (Appl. 1-17; id. Ex. 13, Operating Plan 67; id., V.S. Becker 3, 5.)⁸ Applicants state that labor force changes would include the relocation of certain operating personnel (including Soo Line dispatchers) currently based at CP's U.S. headquarters in Minneapolis to the future CP-KCS U.S. headquarters in Kansas City. (Id., Ex. 13, Operating Plan 67, id., V.S. Becker 9-10.)

⁸ In an erratum filed on November 5, 2021, Applicants corrected information submitted in the Application, including information contained in their labor impact analysis.

Applicants note that the Transaction would be subject to the employee conditions adopted in New York Dock—Control—Brooklyn Eastern District Terminal, 360 I.C.C. 60 (1979), and further note that Applicants would honor the obligations established in the “cramdown” agreements reached in 2000 and 2001 with certain labor organizations that represent certain classes of employees of CP and KCS. (Appl. 1-18; id., V.S. Becker 14.)

PRIMARY APPLICATION ACCEPTED. The Board finds that Applicants have provided sufficient information to satisfy the requirements for a “major” transaction application. The Board finds that the Application meets the requirements of 49 CFR 1180.4, 1180.6, 1180.7, 1180.8, and 1180.9 (2000) and is therefore complete.⁹ See 49 CFR 1180.4(c)(7) (“A complete application contains all information for all applicant carriers required by these procedures, except as modified by advance waiver.”).

On November 19, 2021, UP filed a petition to reject the Application as incomplete, asserting that the Application does not include all the information needed to satisfy the market analyses and operational data requirements under 49 CFR 1180.7 & 1180.8. Specifically, UP argues that the rail-to-rail diversion analysis excludes 32% of potentially divertible traffic, which UP claims critically undermines the market analyses and operating plan, as well as environmental analysis under NEPA. (UP Pet. 4-8.) UP further contends that Applicants fail to support impacts on competition, passenger services, and freight service on tracks used jointly with other railroads. (Id. at 8-15.) Lastly, UP asserts that Applicants should be required to submit a Service Assurance Plan, as required for cases filed under the Board’s current rules,¹⁰ in light of representations made in filings to the Securities and Exchange Commission regarding possible service

⁹ Hereinafter, all citations to 49 C.F.R. part 1180, subpart A, refer to the regulations in effect before July 11, 2001, unless otherwise indicated. See Decision No. 4, FD 36500, slip op. at 2.

¹⁰ 49 CFR 1180.10 (2020) requires applicants in major transactions to identify potential areas of merger-related service degradation and develop plans for mitigating instances of degraded service.

disruptions during the integration process. (*Id.* at 16-17.) On November 22, 2021, Applicants filed a reply to UP’s petition, arguing that UP’s petition was late-filed and that none of UP’s arguments warrant rejection of the Application. Also on November 22, 2021, CN filed a comment in support of UP’s petition.

The Board’s regulations provide the “greatest leeway to develop the best evidence on the impacts of each individual transaction.” 49 CFR 1180.7. Here, Applicants chose a particular traffic dataset to be used in their diversion analysis model and explained those choices in the Application.¹¹ UP’s arguments, submitted near the end of the Board’s 30-day period to review the completeness of the Application, effectively express disagreement with Applicants’ modeling choices and question the adequacy of certain supporting evidence underlying Applicants’ analysis. But, given that Applicants have provided explanations and supporting data and workpapers regarding those choices, such concerns are more appropriately raised as a response to the merits of the Transaction. The Board finds that UP’s arguments regarding the diversion analysis model do not provide a basis for rejecting the Application as incomplete. Applicants have presented a *prima facie* case, disclosing facts that, if construed in their most favorable light, are sufficient to support a finding that the proposed transaction is consistent with the public interest. 49 CFR 1180.4(c)(8). UP’s arguments regarding a Service Assurance Plan also do not warrant rejection of the Application because such a plan is not required under the regulations governing this transaction. The Board notes that, while it finds the Application to be complete, it reserves the right it has exercised in the past to require the

¹¹ Cf. CSX Corp.—Control & Merger—Pan Am Sys., Inc., FD 36472, slip op. at 8-12 (STB served May 26, 2021) (rejecting a merger application as incomplete due to numerous deficiencies that prevented the Board from properly analyzing the competitive effects of the proposed transaction, including, in several areas, the absence of any supporting data).

filing of supplemental information, as necessary. See Soo Line Corp.—Control—Cent. Me. & Que. Ry. US, FD 36368, slip op. at 3 (STB served May 4, 2020).

Accordingly, the Application is accepted and, as discussed below, the Board adopts a procedural schedule for consideration of the Application.

PROCEDURAL SCHEDULE. On March 22, 2021, concurrently filed with their original notice of intent to file an application, CP and KCS jointly filed a petition to establish a procedural schedule. Applicants' proposed procedural schedule provides for a 10-month period between the date an application is filed and the date on which the Board would issue its final decision on the merits. (Pet. 1.) On November 2, 2021, the Board issued a decision that detailed the proposed procedural schedule, proposed its own modifications to the schedule, and requested public comments. See Canadian Pac. Ry.—Control—Kan. City S. (Decision No. 9), FD 36500 (STB served Nov. 2, 2021). The Board noted that, given the high level of interest in this proceeding, as well as the complexity and magnitude of issues that may potentially arise, the 10-month schedule proposed by Applicants did not provide sufficient time. Id. at 2. Instead, the Board proposed to conform the schedule to the time frames set forth in 49 U.S.C. 11325 and 49 CFR 1180.4. Decision No. 9, FD 36500, slip op. at 2.

Application Filing Date. In Decision No. 3, the Board provided notice of Applicants' intent to file an application seeking authority for the acquisition of control by CP of KCS, noting that Applicants had entered into an Agreement and Plan of Merger on March 21, 2021 (March 2021 Merger Agreement). See Decision No. 3, FD 36500, slip op. at 2. On May 21, 2021, KCS notified the Board that it had terminated the merger agreement with Canadian Pacific and had entered into a merger agreement with CN. (KCS Letter 1, May 21, 2021.) KCS stated that, accordingly, it was withdrawing as a co-applicant in this proceeding. (Id. at 2.) In an amended notice, filed on September 15, 2021 (Amended Notice), Applicants stated that KCS rejoins CP as a co-applicant in this

proceeding, as KCS had since terminated its agreement to be acquired by CN. (Amended Notice 2.) Applicants stated that they had executed a definitive Agreement and Plan of Merger (September 2021 Merger Agreement), which “contemplates the same transaction on terms identical in nearly every respect to those set forth” in the March 2021 Merger Agreement. (Amended Notice 2-3.) In Decision No. 8, the Board provided notice of receipt of the Amended Notice. See Decision No. 8, FD 36500, slip op. at 2-3.

Some commenters assert that, under the Board’s regulations, Applicants may not file their application before December 15, 2021, three months from the filing of Applicants’ Amended Notice. (CN Comment 1, Nov. 10, 2021; BNSF Comment 12, Nov. 12, 2021; UP Comment 2, Nov. 12, 2021; CSXT Comment 6 n.23, Nov. 12, 2021.) Given that the March 2021 Merger Agreement had been terminated, some commenters contend that they had no reason to consider, or devote resources to considering, the implications of the Transaction. (CN Comment 2; UP Comment 3; see also CSXT Comment 2.) These commenters assert that Applicants’ Amended Notice effectively restarted the procedural clock and requires a minimum three-month waiting period before their application may be filed and argue that the Board therefore should hold the Application in abeyance and/or treat the Application as filed on December 15, 2021, to provide a sufficient notice period. (CN Comment 5; BNSF Comment 12; UP Comment 4-5.) On November 16, 2021, Applicants filed a reply to these comments.

The Board finds that the Application was properly filed and finds no basis for holding the Application in abeyance. Under 49 C.F.R § 1180.4(b)(1), an applicant shall submit a prefiling notification to the Board, “[b]etween 3 to 6 months prior to the proposed filing of an application in a major transaction.” To account for the possibility that six months would pass without the application being filed, the Board’s regulations explicitly provide that this prefiling notification may be amended to indicate a change in the anticipated filing date of the application. 49 CFR 1180.4(b)(3); see also R.R.

Consolidation Procs., 360 I.C.C. 200, 207 (1980). Here, Applicants satisfied the 3-to-6-month notice requirement on March 22, 2021, when they submitted a prefiling notification that proposed to file an application on or about June 28, 2021. In their Amended Notice, Applicants informed the Board that they had revised the projected filing date of the Application, as contemplated by the Board's regulations, noting that they had executed the September 2021 Merger Agreement, which was nearly identical to the March 2021 Merger Agreement described in Decision No. 3, and proposed the same control transaction contemplated in the initial merger agreement. Nothing in the Board's regulations requires an additional notice period upon the filing of an amended notice. Further, CP did not withdraw its original notice or seek dismissal of this proceeding; rather, it indicated its intent to go forward with an application to acquire control of KCS, notwithstanding the termination of the March 2021 Merger Agreement. (See, e.g., CP Pet. for Expedited Declaratory Relief 3-4, May 27, 2021 (seeking declaratory relief pertaining to discovery materials to enable CP to complete its application despite KCS's termination of the initial merger agreement with CP).) Therefore, the Board finds that Applicants appropriately filed their Application on October 29, 2021.

Evidentiary Record Deadlines. The Board has considered Applicants' request for an expedited procedural schedule, as well as the comments received. The Board received six comments regarding the proposed procedural schedule. Applicants agree with the Board's proposal to extend the evidentiary schedule by 40 days to allow sufficient time for interested parties to evaluate the Application and prepare comments. (CP/KCS Comment 1, Nov. 12, 2021.) However, Applicants request that the deadlines for submitting written comments and for submitting responsive applications be the same. (Id. at 4.) Applicants argue that synchronizing the deadlines for comments and responsive applications would create certain efficiencies for the interested parties. (Id. at 2-3.)

The Board also received separate comments on the proposed procedural schedule from four railroads: CN on November 10, 2021, and BNSF, CSX Transportation, Inc. (CSXT), and UP on November 12, 2021. In addition, the American Chemistry Council and The Fertilizer Institute (ACC/TFI) submitted joint comments on November 12, 2021. The four railroads and ACC/TFI request that the Board extend the time for filing written comments (and, in some instances, subsequent deadlines) by various periods.

BNSF requests that the Board extend all deadlines, starting with the deadline for submitting written comments, by 60 days. (BNSF Comment 2.) BNSF argues that because the Application lacks certain information, additional time would be required to develop the necessary record and analyze the impact of the transaction on domestic and transborder movements. (Id. at 3-9.) CN, CSXT, and UP argue that all deadlines should be extended so that the procedural schedule does not commence before December 15, 2021—three months after the amended notice of intent was filed. (See CN Comment 1; CSXT Comment 6 n.23; UP Comment 2.) CN otherwise expresses general support for the schedule as proposed by the Board. (CN Comment 6.)

CSXT advocates for additional time to develop and analyze the record before interested parties are required to respond to the application. (CSXT Comment 2.) CSXT includes a proposed procedural schedule with its comments, which provides for a written comment deadline of February 28, 2022—122 days after the date on which the Board received the application. (Id., Ex. A.)

Similarly, UP requests that the Board set the deadline for written comments at 120 days after the filing date, consistent with the deadline to submit responsive applications. (UP Comment 6.) It states that the proposed schedule does not allow interested parties sufficient time to review the record and provide comments. (Id. at 5.) UP notes that the rationale that the Board applied to extending the deadline for submitting responsive applications applies equally to written comments because interested parties

are as likely to raise concerns about the proposed transaction in written comments as they are in responsive applications. (Id. at 5-6.)

ACC/TFI request that the Board extend the comment period, and all other deadlines, by two weeks because the current period for written comments encompasses the holidays, when many people would be unavailable. (ACC/TFI Comment 2, Nov. 12, 2021.) According to ACC/TFI, a two-week extension would provide the necessary time to prepare comments without infringing upon holiday activities. (Id.) UP expresses similar concerns about the proposed schedule and the holidays. (See UP Comment 6.) In addition, ACC/TFI, BNSF, CSXT, and UP raise concerns that, under the proposed schedule, there is not sufficient time to resolve potential discovery disputes before the comment deadline. (ACC/TFI Comment 2; BNSF Comment 9 n.5; CSXT Comment 2-3; UP Comment 5 n.13.)

The Board declines to adopt the expedited procedural schedule proposed by Applicants and adopts a procedural schedule pursuant to which the Board will issue its final decision within 90 days of the close of the evidentiary record, consistent with 49 U.S.C. 11325(b)(3), provided that the environmental review process described below is complete. The Board's procedural schedule, which is longer than what was proposed by Applicants, will allow adequate time for comments regarding this important transaction. Additionally, in response to concerns raised by commenters, including Applicants, the Board will synchronize the deadlines for written comments and responsive applications. The Board will extend the deadline for submitting written comments to 120 days after the application filing date to coincide with the deadline for filing responsive applications and set the deadline for responses to written comments at 175 days after the application filing date. The Board's schedule also provides that any necessary oral argument or public hearing would be held on a date to be determined by

the Board. The full procedural schedule (Procedural Schedule) adopted here is set out in the Appendix to this decision.

NOTICE OF INTENT TO PARTICIPATE. Any person who wishes to participate in this proceeding as a Party of Record must file with the Board, no later than **December 13, 2021**, a notice of intent to participate, accompanied by a certificate of service indicating that the notice has been properly served on the Secretary of Transportation, the Attorney General of the United States, Mr. Meyer (representing CP), and Mr. Mullins (representing KCS). Parties who have already submitted a notice of intent to participate are not required to resubmit an additional notice.

If a request is made in a notice of intent to participate to have more than one name added to the service list as a Party of Record representing a particular entity, the extra name(s) will be added to the service list as a “Non-Party.” Any person designated as a Non-Party will receive copies of Board decisions, orders, and notices but need not be served with copies of filings submitted to the Board.

SERVICE ON PARTIES OF RECORD. Each Party of Record will be required to serve upon all other Parties of Record, within 10 days of the service date of this decision, copies of all filings previously submitted by that party (to the extent such filings have not previously been served upon such other parties). Each Party of Record will also be required to file with the Board, within 10 days of the service date of this decision, a certificate of service indicating that the service required by the preceding sentence has been accomplished. Every filing made by a Party of Record after the service date of this decision must have its own certificate of service indicating that all Parties of Record on the service list have been served with a copy of the filing. Members of the United States Congress and Governors are not Parties of Record and need not be served with copies of filings, unless any Member or Governor has requested to be, and is designated as, a Party of Record.

DEADLINES APPLICABLE TO APPEALS AND REPLIES. Consistent with prior major merger proceedings, any appeal to a decision issued by Judge McCarthy must be filed within three working days of the date of his decision; any response to such appeal must be filed within three working days of the date of filing of the appeal; and any reply to any motion filed with the Board itself in the first instance must be filed within three working days of the date of filing of the motion.

ENVIRONMENTAL MATTERS. NEPA requires that the Board take environmental considerations into account in its decision making. Under both the regulations of the Council on Environmental Quality (CEQ) implementing NEPA, and the Board's own environmental regulations, actions are separated into three classes that prescribe the level of documentation required in the NEPA process. Actions that may significantly affect the environment generally require the Board to prepare an EIS. See 49 CFR 1105.4(f), 1105.6(a), 1105.10(a). Actions that may or may not have a significant environmental impact ordinarily require the Board to prepare a more limited Environmental Assessment (EA). See 49 CFR 1105.4(d), 1105.6(b), 1105.10(b). Actions with environmental effects that are ordinarily insignificant may be categorically excluded from NEPA review, without a case-by-case environmental review. See 49 CFR 1105.6(c). A merger transaction generally requires the preparation of an EA or EIS where certain thresholds would be exceeded. See 49 CFR 1105.7(e)(5).

The thresholds for assessing environmental impacts from increased rail traffic on rail lines in railroad merger proceedings are an increase in rail traffic of at least 100 percent (measured in gross ton miles annually) or an increase of at least eight trains per day. 49 CFR 1105.7(e)(5). For air quality impacts, rail lines located in areas classified as being in "nonattainment" areas under the Clean Air Act (42 U.S.C. 7401-7671q) are also assessed if they would experience an increase in rail traffic of at least 50 percent (measured in gross ton miles annually) or an increase of at least three trains

per day. 49 CFR 1105.7(e)(5)(ii). Based on the information provided by Applicants to date, OEA has identified rail lines in Illinois, Iowa, Missouri, Kansas, Oklahoma, Arkansas, Louisiana, and Texas that would experience increases in rail traffic that would exceed the analysis thresholds as a result of the Transaction.

The NEPA Process. Based on information provided by Applicants and in consultation with OEA, the Board has determined that the preparation of an EIS is appropriate. Under NEPA, an EIS is prepared for “major federal actions significantly affecting the quality of the human environment.” 42 U.S.C. 4332(2)(C). An EIS is usually not required in merger cases; a more limited EA generally is sufficient because there are not usually significant environmental impacts from the change in owners and operators of existing lines. 49 CFR 1105.6(b)(4). In this case, however, a full EIS is warranted in light of the magnitude of the projected traffic increases on certain line segments and the potential impacts of the proposed transaction on a number of communities that would likely result from the increased activity levels on rail line segments and at rail facilities. (See Appl. 1-29 to 1-31.)

The EIS process will ensure that the Board takes the hard look at potential environmental consequences that is required by NEPA. On November 12, 2021, OEA issued a Notice of Intent to prepare an EIS and requested comments on the scope of the EIS, including the alternatives and issues to be analyzed. After the close of the comment period on the scope of the EIS on December 17, 2021, OEA will review all comments received and issue a final scope of study for the EIS. Following the issuance of the final scope, OEA will prepare a Draft EIS that will analyze in detail the potential environmental impacts of the Transaction and make recommendations for environmental mitigation. OEA anticipates issuing the Draft EIS in the spring of 2022. The public will have at least 45 days to comment on the Draft EIS. A Final EIS will then be issued that will respond to all public comments received, present the results of any further

environmental analysis, and incorporate final environmental mitigation recommendations. OEA anticipates issuing the Final EIS in the fall of 2022. The Board will consider the entire environmental record in deciding whether to authorize the Transaction as proposed, deny the application, or grant it with conditions, including environmental mitigation conditions.

Historic Review. In accordance with Section 106 of the NHPA, the Board is required to determine the effects of its licensing actions on cultural resources. The Board's environmental rules establish exceptions to the need for historic review in certain cases, including the sale of a rail line for the purpose of continued rail operations where further Board approval is required to abandon any service and there are no plans to dispose of or alter properties subject to the Board's jurisdiction that are 50 years old or older. 49 CFR 1105.8.(b)(1). Applicants do not propose to construct any new rail lines subject to Board licensing or to abandon any rail lines as part of the Transaction. Applicants also have no plans to alter or dispose of properties 50 or more years old, and any future line abandonment or construction activities by Applicants would be subject to the Board's jurisdiction. However, Applicants intend to make certain capital improvements within the rail right-of-way as part of the Transaction, including adding double track, adding facility working track, adding new passing sidings, and extending existing sidings. Consistent with past practice in merger cases, OEA will therefore focus any necessary Section 106 review on the capital improvement projects that Applicants would undertake as part of the Transaction because those projects are the only components of the Transaction that could have the potential to affect cultural resources.

Safety Integration Plan. Applicants state that they will work with the FRA to formulate a SIP to address the safe integration of their rail lines, equipment, personnel, and operating practices. (Appl., V.S. Creel 25.) A SIP is a comprehensive written plan, prepared in accordance with FRA guidelines or regulations, explaining the process by

which Applicants intend to integrate the operation of the properties involved in a manner that would maintain safety at every step of the integration process, in the event the Board approves the Transaction. 49 CFR 1106.2; 49 CFR 244.9. The proposed SIP will be submitted to the Board and to FRA and will be reviewed by OEA and made available for public review and comment during the EIS process, consistent with the Board's regulations at 49 CFR 1106 and with 49 CFR 244.17. If the Board authorizes the Transaction and adopts the SIP, the Board requires compliance with the SIP as a condition to its authorization. 49 CFR 1106.4(b)(4).

In its petition for a procedural schedule, Applicants proposed that the SIP be filed with OEA 30 days after the filing of the Application. However, the Board and FRA's regulations allow for Applicants to submit the proposed SIP up to 60 days after the application is filed, which would be **December 28, 2021**. Accordingly, the Board will also allow Applicants the full 60 days to submit the SIP.

SERVICE OF DECISIONS, ORDERS, AND NOTICES. The Board will serve copies of its decisions, orders, and notices on those persons who are designated on the official service list as a Party of Record or Non-Party. All other interested persons are encouraged to secure copies of decisions, orders, and notices via the Board's website at www.stb.gov.

ACCESS TO FILINGS. Under the Board's rules, any document filed with the Board (including applications, pleadings, etc.) shall be promptly furnished to interested persons on request, unless subject to a protective order. 49 CFR 1180.4(a)(3). The Application and other filings in this proceeding will be furnished to interested persons upon request and will also be available on the Board's website at www.stb.gov. In addition, the Application may be obtained from Messrs. Meyer and Mullins at the addresses indicated above.

It is ordered:

1. The Application in Docket No. FD 36500 is accepted for consideration.

2. The parties to this proceeding must comply with the procedural schedule adopted by the Board in this proceeding as shown in the Appendix to this decision. The parties to this proceeding must comply with the procedural requirements described in this decision.

3. UP's petition to reject the Application is denied.
4. This decision will be published in the Federal Register.
5. This decision is effective on November 26, 2021.

Decided: November 23, 2021.

By the Board, Board Members Begeman, Fuchs, Oberman, Primus, and Schultz.

Jeffrey Herzig

Clearance Clerk

APPENDIX

PROCEDURAL SCHEDULE

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| October 29, 2021 | Application filed. |
| November 26, 2021 | Board notice of acceptance of Application to be published in the <u>Federal Register</u> . |
| December 13, 2021 | Notices of intent to participate in this proceeding due. |
| December 28, 2021 | Proposed Safety Integration Plan (SIP) to be filed with OEA and FRA. |
| January 12, 2022 | Descriptions of anticipated responsive, including inconsistent, applications due. Petitions for waiver or clarification with respect to |

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| | such applications due. |
| February 22, 2022 | Responsive environmental information and environmental verified statements for responsive, including inconsistent, applicants due. |
| February 28, 2022 | Comments, protests, requests for conditions, and any other evidence and argument in opposition to the Application due. This includes any comments from the U.S. Department of Justice (DOJ) and U.S. Department of Transportation (USDOT). Responsive, including inconsistent, applications due. |
| March 30, 2022 | Notice of acceptance of responsive, including inconsistent, applications, if any, published in the <u>Federal Register</u> . |
| April 22, 2022 | Responses to comments, protests, requests for conditions, and other opposition due, including to DOJ and USDOT filings. Rebuttal in support of the Application due. Responses to responsive, including inconsistent, applications due. |
| May 23, 2022 | Rebuttals in support of responsive, including inconsistent, applications due. |
| July 1, 2022 | Final briefs due. ¹² |
| TBD | Public hearing (if necessary). ¹³ (Close of the record.) |

TBD¹² The Board will also determine the page limits for final briefs in a later decision after the record has been more fully developed. Service date of final decision.¹⁴

¹³ The Board will decide whether to conduct a public hearing in a later decision after the record has been more fully developed. See 49 U.S.C. 11324(a) (“The Board shall hold a public hearing unless the Board determines that a public hearing is not necessary in the public interest.”).

¹⁴ 49 U.S.C. 11325(b)(3) provides that the Board must issue its final decision within 90 days of the close of the evidentiary record and that evidentiary proceedings be completed within one year of the date of publication of this notice in the Federal Register. However, under NEPA, the Board may not issue a final decision until after the required environmental review is complete. In the event the EIS process is not able to be concluded in sufficient time for the Board to meet the 90-day provision set forth in § 11325(b)(3), the Board will issue a final decision as soon as possible after that process is complete.

